NO. 66

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

SAN DIEGO BUILDING TRADES COUNCIL, MILLMEN'S UNION, LOCAL 2020, BUILDING MATERIAL AND DUMP DRIVERS, LOCAL 36, Petitioners,

vs.

J. S. GARMON, J. M. GARMON AND W. A. GARMON

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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Interest of the AFL-CIO

This brief *amicus curiae* is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

This brief is submitted by the AFL-CIO because of the importance to all unions of the issue presented in this case. It is the unanimous opinion of the country's union attorneys that this Court's decision in *International Union, etc. v. Russell*, 356 U.S. 634, 78 Sup. Ct. 932, is not only erroneous in theory but a major disaster for the labor movement in practical effect. Our experience substantiates only too

fully the concern expressed by the dissenting Justices that the courts of certain States will utilize the damage suit jurisdiction permitted them by that decision to hamstring legitimate union activities by imposing ruinious liability for minor transgressions of the sort that are the almost inevitable accompaniment of a bitterly fought strike, and will in practical effect thereby frustrate the rights conferred upon workers by the National Labor Relations Act.[1] We hope to argue in an appropriate case that the *Russell* decision should be overruled. Meanwhile we take this opportunity to urge that the *Russell* doctrine not be extended to a case "devoid of any evidence of physical violence on the part of the defendants" (R. 344).

ARGUMENT

When this case was here at the 1956 Term, as a companion case to *Guss* v. *Utah Labor Relations Board*, 353 U.S. 1, 77 Sup. Ct. 598, and *Amalgamated Meat Cutters, etc.* v. *Fairlawn Meats, Inc.*, 353 U.S. 20, 77 Sup. Ct. 604, this Court set aside the injunction against picketing which had been issued by the California courts, stating that its decisions in *Guss* and *Fairlawn Meats* controlled this case "in its major aspects" (353 U.S. 26, 28, 77 Sup. Ct. 607, 608). The opinion continues (353 U.S. at 29, 77 Sup. Ct. at 608):

> "Respondents, however, argue that the award of damages must be sustained under United Construction Workers, etc. v. Laburnum Construction Corp., 347

[1] *Hotel Employees Union* v. *Sax Enterprises*, Nos. 5-6 this Term, and *Staub* v. *City of Baxley*, 355 U.S. 313, 78 Sup Ct. 277, are illustrative of the extraordinary legal expedients to which the courts of certain states resort to deny to workers the right to form unions. That a state Supreme Court will display in successive published opinions such a determination to reach a preordained result as is evident in *Sax Enterprises* will give this Court some inkling of the type of justice meted out to unions in some non-record trial courts in some areas.

U.S. 656. We do not reach this question. The California Supreme Court leaves us in doubt, but its opinion indicates that it felt bound to "apply" or in some sense follow federal law in this case. There is, of course, no such compulsion. Laburnum sustained an award of damages under state tort law for violent conduct. We cannot know that the California court would have interpreted its own state law to allow an award of damages in this different situation. We therefore vacate the judgment and remand the case to the Supreme Court of California * * *."

Despite this Court's plain statement that "We do not reach this question" of whether an award of damages in this case would be sustained under the *Laburnum* decision, on remand the Supreme Court of California, on a 4-3 division, read this Court's language as resolving the pre-emption issue in favor of state jurisdiction. It said (R. 332):

> "Again, if it had been the intent of the Supreme Court to limit jurisdiction to torts of violence an order of reversal and not an order of remand would also seem to have been appropriate as the record which that court had before it was devoid of any evidence of physical violence on the part of the defendants."

The dissenting opinion in the state supreme court denies that this Court's order of remand is susceptible of any such construction (R. 344):

> "The Supreme Court, pursuing its usual policy of judicial economy, declined to answer a problem when an answer was not strictly compelled."

The court below also held that it had jurisdiction under the *Laburnum* decision to award damages for peaceful picketing, and, finally, that damages were recoverable in this case as a matter of California law. On each of these issues, too, the court divided 4-3.

We believe it clear beyond need for argument that the California Supreme Court majority misconstrued the sig-

nificance of this Court's remand. We therefore pass that question to deal with the issue reserved by this Court whether "the award of damages must be sustained under" *Laburnum* "in this different situation," i.e., in a case not involving violence.

We contend, first, that it is clear from this Court's decisions that it is the subject matter of the action, i.e., the type of conduct involved, that is decisive of the issue of federal pre-emption, and not the type of relief sought in the state courts. We contend, secondly, that if the question be regarded as open, the same result is desirable as a matter of policy; and, indeed, that the alternative doctrine that pre-emption turns on the type of relief sought would be wholly unworkable and destructive of any uniform national labor relations policy.

I

Under This Court's Decisions, Pre-emption Turns on the Subject Matter of the Case and Not the Type of Relief Sought.

In the *Laburnum* case this Court, on a 6-2 division, sustained a state court award of damages against a union for violent conduct injurious to the employer's business, although the Court assumed that the conduct also incidentally constituted an unfair labor practice against employees under Section 8(b)(1) of the National Labor Relations Act. The narrow question here presented is whether the holding of the *Laburnum* case is to be extended to a state court damage award against a union for peaceful picketing which is within the regulatory ambit of the National Labor Relations Act.

In reaching its conclusion that the type of relief sought is decisive of the issue of federal pre-emption, the court below relied on and quoted certain language of the majority opinion in the *Laburnum* case, written by Mr. Justice Burton, as follows (R. 331-32, 347 U.S. at 665, 74 Sup. Ct. at 838):

"To the extent that Congress prescribed preventive procedure against unfair labor practices, that case [Garner] recognized that the Act excluded conflicting state procedure to the same end. To the extent, however, that Congress has not prescribed procedure for dealing with the consequences of tortious conduct already committed, there is no ground for concluding that existing criminal penalties or liabilities for tortious conduct have been eliminated. The care we took in the Garner case to demonstrate the existing conflict between state and federal administrative remedies in that case was, itself, a recognition that if no conflict had existed, the state procedure would have survived. The primarily private nature of claims for damages under state law also distinguishes them in a measure from the public nature of the regulation of future labor relations under federal law."

We should be less than frank not to acknowledge that this language does seem to say that it is the type of remedy sought, rather than the type of conduct involved, that determines whether the States may exercise jurisdiction. The majority opinion in *International Union, etc.* v. *Russell*, 356 U.S. 634, 78 Sup. Ct. 932, also written by Mr. Justice Burton, likewise describes the pre-emption problem as concerned with the possibility of "conflict of remedies." 356 U.S. 644, 78 Sup. Ct. at 938.

More often, however, the Court has declared that pre-emption turns on whether the National Labor Relations Board has "exclusive jurisdiction over the subject matter." *Weber* v. *Anheuser-Busch, Inc.*, 348 U.S. 468, 476, 75 Sup. Ct. 480, 485. And see *Capital Service, Inc.* v. *Labor Board*, 346 U.S. 936, 74 Sup. Ct. 375, 347 U.S. 501, 74 Sup. Ct. 699; *Bethlehem Steel Co.* v. *New York State Labor Rel. Bd.*, 330 U.S. 767, 772, 67 Sup. Ct. 1026, 1029. Different language embodying the same concept was used in *Garner* v. *Teamsters, Chauffeurs and Helpers, etc.*, 346 U.S. 485, 488, 74 Sup Ct. 161, 165:

"Congress has taken in hand this particular type of controversy where it affects interstate commerce."

Further, if we turn from the Court's language to what it has actually done it becomes unequivocally clear that the Court regards the subject matter of the case as determinative of the pre-emption issue, rather than the type of relief sought.

In *Anheuser-Busch*, decided shortly after *Laburnum*, the union struck in support of a demand that a collective bargaining agreement provide that the employer would hire to do a certain type of work only contractors having collective bargaining agreements with the union. The Missouri courts enjoined the strike as in violation of the State's restraint of trade statute. In reversing, this Court pointed out the conduct in question might be in violation of Section 8(b)(4) (A) or (B) of the National Labor Relations Act, and (348 U.S. at 478-79, 75 Sup. Ct. at 487):

"If this conduct does not fall within the prohibitions of § 8 of the Taft-Hartley Act, it may fall within the protection of § 7, as concerted activity for the purpose of mutual aid or protection."

This Court did not resolve these questions, however, saying that they were for the Labor Board in the first instance, and that (348 U.S. at 481, 75 Sup. Ct. at 488):

"* * * the subject matter is the concern exclusively of the federal Board and withdrawn from the State."

Such a disposition of the matter would hardly have been possible under the "conflict of remedies" test of pre-emption. Rather the Court would have had to interpret the National Labor Relations Act and determine itself whether the conduct was either prohibited or protected by that Act, since if it were neither, so that no remedy was available to

either side before the federal Board, there could be no conflict of remedies.

For the same reason *Garner* is likewise a precedent against the "conflict of remedies" test, since there too the Court found pre-emption while declaring that (346 U.S. at 489, 74 Sup. Ct. at 165):

> "It is not necessary or appropriate for us to surmise how the National Labor Relations Board might have decided this controversy had petitioners presented it to that body."

In *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62, 76 Sup. Ct. 559, the Court did itself resolve in the first instance a substantive issue arising under the National Labor Relations Act, and on the basis of its resolution it found conflict between the state court decision and the substantive federal law. In the peculiar circumstances of that case, however, the substantive issue probably could not have come before the National Labor Relations Board because of the procedural barriers interposed by Sections 9(f)-(h) of Taft-Hartley.

Other cases subsequent to *Laburnum* likewise make it clear that it is the subject matter of the action, and not the type of relief sought, that is significant on the issue of pre-emption. The language above quoted from the *Laburnum* opinion states that "to the extent that Congress prescribed preventive procedure against unfair labor practices * * * the Act excluded conflicting state procedure to the same end." This seems to mean that if conduct is reachable by the preventive procedure of the National Labor Relations Act—i.e., if it constitutes an unfair labor practice, then state preventive procedure is precluded. However, when this contention was presented to the Court by the Union in *United Automobile Workers* v. *Wisconsin Employment Relations Board*, 351 U.S. 266, 76 Sup. Ct. 794

(the *Kohler* case),[2] it was rejected by a majority of the Court. The Court majority declared (351 U.S. at 274, 76 Sup. Ct. at 799):

> "As a general matter we have held that a State may not, in the furtherance of its public policy, enjoin conduct 'which has been made an "unfair labor practice" under the federal statutes.' * * * But our post-Taft-Hartley opinions have made it clear that this general rule does not take from the States power to prevent mass picketing, violence, and overt threats of violence. The dominant interest of the State in preventing violence and property damage cannot be questioned. It is a matter of genuine local concern. Nor should the fact that a union commits a federal unfair labor practice while engaging in violent conduct prevent States from taking steps to stop the violence."

Only the three dissenting Justices repeated the rationale of the *Laburnum* case (351 U.S. at 276, 76 Sup. Ct. at 800):

> "Of course the States may control violence. They may make arrests and invoke their criminal law to the hilt. They transgress only when they allow their administrative agencies or their courts to enjoin the conduct that Congress has authorized the federal agency to enjoin."

The Court majority on the other hand squarely rejected any conflict of remedies test of pre-emption, and upheld concurrent state jurisdiction because of the nature of the subject matter—i.e., violence.

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[2] Actually the Union's argument in *Kohler* was framed more narrowly than the quoted language from *Laburnum* required. The Union's argument was that conduct constituting an unfair labor practice under the national Act could not be prevented by the State as a regulation of labor relations. The dissenting Justices in this Court seem, however, in line with the *Laburnum* language, to have taken the broader position that a State may not prevent such conduct at all.

That state jurisdiction was upheld in *United Automobile Workers* v. *Wisconsin Employment Relations Board* out of respect for the state's responsibility for the prevention of violence, and despite the fact that the relief sought was of a type likewise available from the National Board, is further made clear by the Court's subsequent decisions in *Youngdahl* v. *Rainfair, Inc.*, 355 U.S. 131, 78 Sup. Ct. 206, and *International Union, etc.* v. *Russell*, 356 U.S. 634, 78 Sup. Ct. 932.

In *Rainfair* pickets had engaged in abusive language, mass name calling, etc., and the state court, on the ground that this conduct was calculated to provike violence, enjoined all picketing. A majority of this Court held that the state court was within its discretionary power in enjoining future acts of violence or intimidation, but all of the Justices were of the view that the state court "entered the pre-empted domain" of the national Board insofar as it enjoined peaceful picketing. Three Justices dissented in part, on the ground that the national Board had exclusive jurisdiction of the entire controversy.

Russell was a suit for damages for unlawful interference with the plaintiff's occupation, based on the fact that the union had, during the course of a strike, engaged in mass picketing and other conduct which prevented the plaintiff from entering the plant where he was normally employed. The union sought to distinguish the case from *Laburnum* on the ground that in *Russell* the national Board could have awarded back pay as part of its remedy, but a majority of the Court held *Laburnum* nevertheless controlling. Here again, state jurisdiction was upheld because the case fell within the "violence" exception, even though the State was affording a type of remedy assumed to be available from the federal Board.

Finally, *International Association of Machinists* v. *Gonzales*, 356 U.S. 617, 78, Sup. Ct. 923 once more demonstrates

that it is the type of conduct out of which the suit arises, rather than the type of relief sought, that is controlling on the pre-emption issue. The plaintiff in that case had been expelled from the union. He sued for reinstatement, and for damages for lost wages and for physical and mental suffering, and the California courts entered judgment in his favor in both respects. The main substance of the controversy lay outside the reach of the federal Act, which explicitly declares in the proviso to Section 8(b)(1)(A) that the general language of that Section shall not impair the right of a union to prescribe its own membership rules. Hence the union conceded that the California courts had jurisdiction as respects the plea for reinstatement to union membership. The union argued, however, that the plea for damages for lost wages fell within the exclusive jurisdiction of the federal Board, in view of the power of that Board to award reinstatement with back pay if it finds violation of the Taft-Hartley restrictions on discrimination in employment on account of union membership or non-membership. The Court majority held, however, that this potential overlap of jurisdiction was too contingent to justify depriving the state court of jurisdiction, in view of the fact that the main "subject matter of the litigation," i.e., union membership, was outside the scope of the federal Act.

A third type of subject matter with respect to which this Court had upheld state jurisdiction is restrictions on union security agreements. *Algoma Plywood & Veneer Co.* v. *Wisconsin Employment Relations Board*, 336 U.S. 301, 69 Sup. Ct. 584. In *Anheuser-Busch* this Court summarized the *Algoma* decision thus (348 U.S. at 477, 75 Sup. Ct. at 486):

> "Since nothing in the Wagner or Taft-Hartley Acts sanctioned or forbade these clauses, they were left to regulation by the State."

As respects the Wagner Act, this statement of the Court

is supported by the Act's legislative history, and at least not contradicted by its language.

When it comes to Taft-Hartley, however, it is a different story. That Act plainly does, in Section 8(a)(3), sanction a particular type of union security clause: in fact it regulates the subject in great detail. As the Court said in *Algoma* (336 U.S. at 314, 69 Sup. Ct. at 591): "* * * § 8(3) [sic] of the new Act forbids the closed shop and strictly regulates the conditions under which a union-shop agreement may be entered [sic] * * *." Thus the effect of Section 14(b) is to permit the States to override the federal law, i.e. (336 U.S. at 313-14, 69 Sup. Ct. at 591):

> "* * * the States are left free to pursue their own more restrictive policies in the matter of union security agreements."

The statement above quoted from *Anheuser-Busch* notwithstanding, the Court did not in fact say in *Algoma* that Taft-Hartley embodied no affirmative federal policy on union security. Rather it referred, quite accurately to (336 U.S. at 315, 69 Sup. Ct. at 592):

> "* * * the permission granted the States by § 14(b) of the Taft-Hartley Act to carry out policies inconsistent with the Taft-Hartley Act itself * * *."

Section 14(b) thus appears to clash head on with the declaration of the Supremacy Clause, Article VI, Clause 2, that—

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, and Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

This issue was not considered in *Algoma* and appears never to have been decided by the Court.

However that may be, there is nothing in the cases dealing with state restrictions on union security that suggests that the type of remedy afforded by the State has any bearing on the federal pre-emption issue.

II

As a Matter of Policy, Pre-emption Should Turn on the Subject Matter of the Case and Not the Type of Relief Sought.

Assuming that the issue is not settled by the prior decisions of this Court, we submit that as a matter of policy pre-emption should turn on the subject matter of the case and not the type of relief sought by the plaintiff. Indeed we believe it can be demonstrated that the alternate doctrine that pre-emption turns on the type of relief sought would be wholly unworkable and destructive of any uniform national labor relations policy.

In addition to its rulings that various types of subject matter are within the exclusive purview of the National Labor Relations Board, this Court has many times ruled that a State may not prohibit the exercise of rights which the federal Act protects. See, *e.q., Hill* v. *State of Florida ex rel. Watson,* 325 U.S. 538, 65 Sup. Ct. 539; *International Union, etc.* v. *O'Brien,* 339 U.S. 454, 70 Sup. Ct. 781; *Amalgamated Ass'n, etc.* v. *Wisconsin Employment Relations Board,* 340 U.S. 383, 71 Sup. Ct. 359; *Weber* v. *Anheuser-Busch, Inc.,* 348 U.S. 468, 75 Sup. Ct. 480. The Court has held that the states may not ignore these federal substantive rights, either on the theory that they are public rights only (*Garner* v. *Teamsters Union,* 346 U.S. 485, 74 Sup. Ct. 161), or because of the lack of a federal remedy (*United Mine Workers* v. *Arkansas Oak Flooring Co.,* 351 U.S. 62, 76 Sup. Ct. 559).

It would seem to be axiomatic that the principle that the States may not transgress federal substantive rights applies to state court criminal prosecutions and damage suits

as well as to state preventive remedies. In both *Laburnum* and *Russell* the conduct giving rise to damages was assumed to be prohibited by the federal Act, and certainly it was not protected. And the *Russell* decision rests explicitly on the conclusion of the Court majority (356 U.S. 634, 645, 78 Sup. Ct. 932, 939):

> "Nor do we think that the Alabama tort remedy, as applied in this case, altered rights and duties affirmatively established by Congress."[3]

Thus a doctrine that the States may entertain damage suits arising out of labor disputes falling within the jurisdiction of the federal Board clearly would be subject to the caveat that the state courts could not award damages for engaging in conduct protected by the federal Act.

Subject to such a caveat, such a doctrine would, however, be quite unworkable.

It might be workable if the substantive federal rights were precise and clear cut, and if their existence could be determined in isolation from the adjudication of other federal issues. But such is not the case.

Section 7 of the National Labor Relations Act, which grants certain broad substantive rights to employees and their unions, is anything but precise. It reads:

> "RIGHTS OF EMPLOYEES
>
> "Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted

[3] We do not of course mean that we agree with this conclusion of the Court majority. To the contrary, the uniform experience of union attorneys is in line with the conclusion of the dissenting opinion that (356 U.S. at 650, 78 Sup. Ct. at 941-42):

> "The Federal Act represents an attempt to balance the competing interests of employee, union and management. By providing additional remedies the States may upset that balance as effectively as by frustrating or duplicating existing ones."

> activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

This general language gains specific content only as it is applied on a case-by-case basis by the federal Board and the reviewing federal courts.

Further, the general language of Section 7 is conditioned and restricted by numerous other provisions of the federal Act, such as Section 8, which proscribes as unfair labor practices various types of employee and union activity which would otherwise fall within the sanction of Section 7. Section 7, for example, in general accords to employees the right to strike and picket, but those rights are subject to numerous qualifications and restrictions imposed by other sections of the Act, such as Section 8(b)(4). Thus it is quite usual for an employer to contend that particular striking or picketing is prohibited by Section 8(b)(4), while the union asserts that it is "concerted activity," the right to engage in which is protected by Section 7. As this Court said in *Weber* v. *Anheuser-Busch, Inc.*, 348 U.S. 468, 478-79, 75 Sup. Ct. 487):

> "If this conduct does not fall within the prohibitions of § 8 of the Taft-Hartley Act, it may fall within the protection of § 7, as concerted activity for the purpose of mutual aid or protection."

A doctrine that the States may exercise damage suit jurisdiction over cases which are within the jurisdiction of the federal Board except that the States may not amerce for conduct protected by the federal Act, would mean that in each case the state court would have to interpret the general, complicated, and interrelated provisions of the federal Act, and reach a determination whether that Act sanctioned the activity in question. Conflicting and inconsistent

holdings would be certain to result. As this Court said in *Garner* v. *Teamsters Union*, 346 U.S. 485, 490-91, 74 Sup. Ct. 166:

> "A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law."

Each state court determination would present a federal question which this Court could be asked to review. In every case in which a state statute was involved and a claim to the protection of the federal Act was rejected, an appeal to this Court would lie under Title 28, Sec. 1257(a). In innumerable other cases conflicts among the state courts, and between state courts and the federal Board and the federal reviewing courts, would furnish grounds for petitions for certiorari. Either conflicting and inconsistent decisions to the point of chaos would ensue, or a heavy burden would be placed on this Court.

Finally, the state courts or boards, and this Court on any review, would have to decide these issues in the absence of any decision by the National Labor Relations Board. In both the *Garner* and *Anheuser-Busch* cases this Court expressed reluctance to interpret the National Labor Relations Act save after an initial decision by the federal Board.

We advanced these arguments in our brief amicus in *Amalgamated Meat Cutters, etc.* v. *Fairlawn Meats, Inc.*, 353 U.S. 20, 77 Sup. Ct. 604, in connection with the "no-man's land" issue. As we read the Court's opinion in that case, they were accepted by the Court. The Court said (353 U.S. at 23-24, 77 Sup. Ct. at 606):

> "It is urged in this case and its companions, however, that state action should be permitted within the area of commerce which the National Board has elected not to enter when such action is consistent with the policy of the National Act. We stated our belief in Guss v. Utah Labor Relations Board, 353 U.S. 10, 11,

77 S.Ct. 603, that 'Congress has expressed its judgment in favor of uniformity.' We add that Congress did not leave it to state labor agencies, to state courts or to this Court to decide how consistent with federal policy state law must be. The power to make that decision in the first instance was given to the National Labor Relations Board, guided by the language of the proviso to § 10(a). This case is an excellent example of one of the reasons why, it may be, Congress was specific in its requirement of uniformity. Petitioners here contend that respondent was guilty of what would be unfair labor practices under the National Act and that the outcome of proceedings before the National Board would, for that reason, have been entirely different from the outcome of the proceedings in the state courts. Without expressing any opinion as to whether the record bears out its factual contention, we note that the opinion of the Ohio Court of Appeals takes no account of the alleged unfair labor practice activity of the employer. Thus, it cannot be said with certainty whether the state court's decree is consistent with the National Act."

Thus the only issue which seems to be even technically open in this case is whether a different result should be reached with respect to state court damage suits. It is, in other words, whether state courts should exercise jurisdiction to award damages arising out of labor disputes within the jurisdiction of the federal Board, subject to the limitation that they do not impair substantive rights conferred by the federal Act. However, it is apparent that any such doctrine would be quite as unworkable in damage suits as in injunction suits.

The present case itself illustrates that.

According to the finding of the trial court, the petitioning unions picketed the employer respondents in support of a demand that respondents enter into a collective bargaining agreement with petitioners containing union shop provisions of the sort permitted by the National Labor Relations

Act; this despite the fact that petitioners did not represent any of respondents' employees (R. 13, 14). The trial court held that the picketing was an unfair labor practice under the National Labor Relations Act because of the union shop demand (R. 16, 17). Accordingly it enjoined petitioners from picketing in order to compel respondents to enter into a union shop agreement unless and until petitioners "have been properly designated as the collective bargaining representative" (R. 25). The trial court also awarded damages in the amount of $1,000 (R. 25).

The state Supreme Court, on its first review of the case, likewise concluded that the picketing was unlawful because the union shop demand constituted an unfair labor practice under the federal Act (45 Cal.2d 657, 666, 291 P.2d 1, 7, R. 52).[4]

Thus far the case was a fairly clear cut one of a state court applying relatively unambiguous substantive federal law. Up to that point the present case does not, it may be conceded, itself illustrate the impracticability of concurrent state jurisdiction—either as respects the injunctive relief or the damage award. However, this Court remanded the case for the state Supreme Court to reconsider the damage award in the light not of federal law but of "its own state law"; and the subsequent course of this case does illustrate the chaos and the destruction of any uniform national labor relations policy that would be inherent in state court jurisdiction over damage suits arising out of federal unfair labor practices.

California has no statute which prohibits or restricts closed or union shop agreements as does the Taft-Hartley Act; and it likewise has no statute which in terms prohibits

[4] In its second opinion the state Supreme Court majority asserted of its first opinion that (R. 329): "It may be said that both the state and federal laws were relied on as establishing actionable conduct." The court's first opinion does not, however, disclose any reliance on state law.

or restricts picketing in support of a union or closed shop demand. Accordingly the California Supreme Court majority did not in its second opinion rest on any such theory. Rather it adopted, for the first time, the doctrine earlier developed by the Supreme Courts of Maine and Wisconsin, and upheld by this Court against the due process attack (*Stacey* v. *Pappas*, 350 U.S. 870, 76 Sup. Ct. 117; *Teamsters* v. *Vogt, Inc.*, 354 U.S. 284, 77 Sup. Ct. 1166), that picketing may be prohibited if the court concludes that the union's purpose is to coerce the employer into coercing his employees to join the union (R. 333-343).

At this point the impracticability of permitting state courts to adjudicate this sort of issue, whether in damage suits or not, becomes manifest.

It is true that about a year ago the National Labor Relations Board, reversing the construction it had for ten years placed on Section 8(b)(1) of the National Labor Relations Act, itself promulgated a doctrine which approximates that of the *Stacey* and *Vogt* cases. *Curtis Brothers, Inc.*, 119 N.L.R.B. No. 33, 41 LRRM 1025. Under this doctrine the Board examines the individual circumstances of each case and prohibits union picketing if it determines that its real purpose is to coerce employees with respect to union membership through the application of economic pressure against their employer. State another way, the Board currently prohibits minority picketing if it concludes that the picketing union really seeks immediate recognition, rather than to organze as an intermediate step to recognition.[5] The Board does not, however, accept the demands actually made by the union or the signs carried by its pickets as showing the union's purpose. Rather it draws its own conclusions as to what the union is really up to.

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[5] Recognition picketing by a majority union is protected activity under the federal act. *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62, 76 Sup. Ct. 559.

At first impression it might appear that since the federal Board is itself thus currently applying a doctrine which approximates that adopted by the court below on remand, the danger of conflict between federal and state doctrines and authorities is minimized or at least not illustrated in this case. However, even as respects this particular type of case, there are three difficulties with permitting adjudication by state courts.

In the first place, according to both the California Supreme Court and the Board, the decisive issues are factual ones, i.e., the union's majority or minority status and its real purpose in picketing. There is little reason to suppose that forty-nine state tribunals weighing these individual situations would uniformly reach the same conclusion as would the federal Board. Rather as this Court said in *Garner* (346 U.S. 485, 490-91, 74 Sup. Ct. 161, 166):

> "A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law."

Further, each state court determination of the union's majority or minority status, or of the motivation behind its picketing, would seem to present a federal question which this Court could be asked to review.

In the second place, the doctrine of the current federal Board majority[6] that minority recognition picketing is an unfair labor practice rests on, to say the least, tenuous legal grounds. In the only judicial test of the doctrine to date the Board's order was set aside. *Drivers. Local 639* v. *NLRB (Curtis Brothers, Inc.)*, 43 LRRM 2156 (D.C.Cir., November 26, 1958). The court ruled that Section 8(b)(1)

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[6] Former Board Member Murdock dissented in *Curtis Brothers* from the adoption of this doctrine; and his successor, Board Member Fanning, has likewise dissented in subsequent cases applying the *Curtis* doctrine. See, *e.g.*, *Andrew Brown Co.*, 120 N.L.R.B. No. 89, 42 LRRM 1195.

is not applicable to peaceful picketing whether by a majority or a minority union, and that it matters not whether the union's immediate purpose is to organize or to obtain recognition. The court pointed out that the Board's new doctrine flies in the teeth of the Act's explicit legislative history, and of ten years construction by the Board itself. Thus while the doctrine enunciated by the California court on remand in the current case may be reconcilable with the doctrine currently followed by the national Board, it is unlikely that it is reconcilable with federal law. It may also be pointed out that this coincidence of doctrine between the California court and the Board is a new thing: the doctrine that recognition picketing by a minority union is unlawful was first heard of in California in the current case and first articulated by the Board in the *Curtis* case just reversed by the Court of Appeals.

Thirdly, the decision of the court below that minority recognition picketing is illegal presents a federal issue: if recognition picketing is protected rather than prohibited by the federal Act, as the Court of Appeals for the District of Columbia has held, the decision below presumably may not stand.[7] We accordingly at one time contemplated covering in this brief the whole issue of the validity of the Board's *Curtis* doctrine. It seems to us most unlikely, however, that this Court will wish to adjudicate this sort of complicated and important question as to the construction of the federal Act as a collateral issue on review of a state court pre-emption case. This Court has several times pointed out that the construction of the federal Act should be determined in the first instance by the national Board, subject to review by the Courts of Appeal and this Court.

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[7] That question is complicated, however, by the fact that if the decision of the court below on remand had rested, like its first decision, on the unlawful union shop demand, then its decision would have been consistent with substantive federal law, whatever the ultimate disposition of the issue presented in *Curtis*.

If, contrary to our expectation, the Court should conclude to determine the *Curtis* issue in this case, it will no doubt direct that it be briefed by the parties, and we will in that event request leave also to file a supplemental brief on the point.

Thus as we suggested earlier this case does itself illustrate the difficulties of any doctrine that the states may exercise jurisdiction over damage suits arising out of unfair labor practices covered by the National Labor Relations Act, as long as they adhere to substantive federal law. Those difficulties, to sum up, are:

1. According to the court below and the federal Board, the legality of picketing in a case like the present turns on the conclusion reached by the adjudicating body as to the real purpose of the picketing. Under such a doctrine the legality of picketing would vary from place to place and time to time according to the predilections of the adjudicators. Chaos would replace any national policy.

2. According, however, to the Court of Appeals for the District of Columbia the decision below conflicts with substantive federal law and penalizes conduct which is protected by the federal Act—and that regardless of the purpose of the picketing.

3. It is not desirable for state tribunals to undertake the interpretation of the federal Act in the first instance, or for this Court to determine such issues as the legality of recognition picketing as a collateral question in a pre-emption case.

4. Hence the desirable, and only practicable, solution is that state courts may not entertain suits for damages in labor disputes falling within the ambit of the federal Act.

CONCLUSION

For the reasons set forth above it is respectfully submitted that the decision of the court below should be reversed with directions that the case be dismissed.

Respectfully submitted,

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